Supreme Court, U. S.
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No. 75-643

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES L. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of two counts of willfully attempting to evade income tax for 1967 and 1968 by filing false and fraudulent returns, in violation of 26 U.S.C. 7201. The district court fined him $2,500 on each count and sentenced him to two concurrent terms of five years' imprisonment, the first six months of which are to be served and the balance on probation. The court of appeals affirmed (Pet. App. A 1-10).

During the prosecution years petitioner operated a subfranchise under a regional franchise in the magazine subscription sales business, which had gross receipts of almost $600,000 in 1967 and more than $700,000 in 1968 (Pet. App. A 2-3). Although his true taxable income was $26,415 for 1967 and $44,036 for 1968, petitioner

reported taxable income of only $11,225 and $16,580 for those years (Pet. App. A 1-2).

1. Petitioner first contends (Pet. 9-19) that his motion to suppress evidence should have been granted because he was tricked by the Treasury agents into turning over incriminating materials, and because the agents did not give him the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436. In order to prevail on his claim that he was deceived by the revenue agent — who had no information to indicate fraud until he referred the case to the Intelligence Division in May, 1970 (Motion Tr. 51-52, 57)[1] —petitioner had to establish by clear and convincing evidence that the agent made an affirmative misrepresentation for the purpose of misleading him. See, *e.g.*, *United States* v. *Prudden*, 424 F.2d 1021 (C.A. 5); *United States* v. *Sclafani*, 265 F.2d 408 (C.A. 2). However, after a full hearing, the district court correctly concluded that petitioner did not meet his burden of proving that the agents had deceived him.[2]

Moreover, petitioner's claim of entitlement to *Miranda* warnings is likewise without merit. When the special agent first telephoned petitioner and advised him that one of the special agent's functions was the investigation

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[1]"Motion Tr." refers to the transcript of the hearing on the motion to suppress evidence. "Tr." refers to the trial transcript.

[2]Nothing in the evidence petitioner alleges to be newly discovered suggests any deceit or trickery on the part of the agents. At all events, petitioner's remedy is either to move for a new trial on the ground of newly discovered evidence or to attack the judgment collaterally under 28 U.S.C. 2255. In either case, the proceeding must be commenced in the district court. *United States* v. *Brown*, 476 F.2d 933 (C.A.D.C.); see *Scott* v. *United States*, 334 F.2d 72 (C.A. 6), certiorari denied, 379 U.S. 842.

of possible criminal tax fraud (Motion Tr. 16-18), petitioner stated that he was going to talk to his attorney (Motion Tr. 29-36), who handled all subsequent contacts with the Service. The special agent thus never met with petitioner and no evidence was obtained during his contact with petitioner. Thus, this case does not raise the issue presented in *United States* v. *Beckwith*, 510 F.2d 741 (C.A.D.C.), certiorari granted, 422 U.S. 1006, argued December 1, 1975, as to whether special agents are required to give *Miranda* warnings to a taxpayer in a non-custodial interview.

2. Petitioner further contends (Pet. 19-20) that the district court erred in denying a continuance when one of his trial counsel became ill in January, 1974. The facts are as follows: The case went to trial on February 25, 1974, nine months after it was originally set for trial. Petitioner was represented at the trial by Robert J. Rotatori, an experienced criminal lawyer, who had been in the case for over ten months, and who was assisted by associate defense counsel who was a certified public accountant and who had formerly been employed by the Internal Revenue Service. Both counsel were thoroughly familiar with the case, so that the illness of a third counsel in no way prejudiced petitioner. Thus, the trial court's denial of his motion for a continuance was within its discretion. *Giacalone* v. *Lucas*, 445 F.2d 1238 (C.A. 6), certiorari denied, 405 U.S. 922; *United States* v. *Abshire*, 471 F.2d 116 (C.A. 5). As the court of appeals stated (Pet. App. A 5), "The record discloses that Allen's defense was ably conducted by Mr. Rotatori."

3. Petitioner also argues (Pet. 21-25) that the trial court erred in denying certain Jencks Act material to the defense for use in cross-examination of the government agents. The documents in question are the revenue agent's referral report originally transmitting the case to the Intelligence Division for investigation of a possible crime,

the revenue agent's report, and the special agent's criminal reference report. However, the government turned over to the defense six schedules containing net worth computations which were the basis for the revenue agent's referral report. Although the two-page report itself was withheld, the district court correctly concluded that it was a nonproducible inter-departmental communication.

The revenue agent's report itself consisted merely of net worth schedules, which were useful in computing petitioner's income tax liability for civil purposes. Since petitioner conducted extensive cross-examination of both the revenue agent and the government's expert witness who computed and testified about petitioner's income tax liability based upon the evidence produced at trial, the court of appeals properly held that even though the entire reports "could have been considered producible under the Jencks Act, the failure to order production was harmless error" (Pet. App. A 9). See also *United States* v. *Ball*, 428 F.2d 26 (C.A. 6).[3]

4. Contrary to petitioner's additional argument (Pet. 26-29), the trial court properly admitted into evidence the government's summary exhibit (Govt. Ex. 31). The government may use expert witnesses and summary schedules in proving criminal tax cases. *United States* v. *Johnson*, 319 U.S. 503, 519-520; *Holland* v.

[3]Moreover, petitioner's argument (Pet. 28-29) relating to alleged misuse of microfilm records rests not upon documents admitted into evidence but upon documents appearing only in two volumes of "appendages" which petitioner attempted to persuade the court of appeals to incorporate into the record. That court properly refused to do so (Pet. App. A 10). *In re Buckey*, 395 F.2d 385, 387 (C.A. 6); *United States* v. *Collins*, 349 F.2d 296, 298 (C.A. 6). With respect to the third document—the special agent's criminal reference report—petitioner never requested it (Pet. App. A 8).

United States, 348 U.S. 121, 127-128. Indeed, without such summaries of the evidence, the jury would lack essential guidance in complex tax evasion cases. Here, the government's witness properly testified as to the evidentiary basis for each entry on the summary (Tr. 1107-1183, 1202-1233, 1244-1270). "Guarding instructions" relating to the use to which the jury could put the summaries were given at both the start (Tr. 1107) and the end (Tr. 1292-1293) of the agent's testimony, and again in the main charge (Tr. 1521-1522). See *Holland* v. *United States*, *supra*, 348 U.S. at 127-128.

5. Petitioner argues (Pet. 29-30) that the government agents should not have been permitted to testify that they had been unable to substantiate the accounts receivable that petitioner alleged he had at the starting point of the net worth computation. However, the agents did not testify what third parties had told them, but described only the results of their own inquiries, *i.e.*, that they were unable to substantiate petitioner's claims. This testimony was properly admissible.

In *Holland* v. *United States, supra*, 348 U.S. at 135-136, this Court explained the need for the government to check out leads which could reasonably be verified and which, if true, would establish the taxpayer's innocence. All the agents did here was to describe the steps taken in their investigation of these leads and the results of that investigation (Tr. 1087-1102). Their testimony properly went to the question of whether they had discharged their duty of following leads rather than the question of whether the amounts in question were accurate. *United States* v. *Penosi*, 452 F.2d 217, 219 (C.A. 5), certiorari denied, 405 U.S. 1065; *Charron* v. *United States*, 412 F.2d 657 (C.A. 9); *McClanahan* v. *United States*, 292 F.2d 630, 637 (C.A. 5).

6. The failure to record the grand jury testimony of the special agent who investigated petitioner's case was not error (see Pet. 30-32). When the agent testified before the grand jury, the practice in the district was not to record the testimony of special agents (Tr. 786-788). There is no constitutional or statutory requirement for the recording of grand jury testimony. *United States* v. *Battisti*, 486 F.2d 961 (C.A. 6); *United States* v. *Heck*, 499 F.2d 778 (C.A. 9); *United States* v. *Cramer*, 447 F.2d 210 (C.A. 2), certiorari denied, 404 U.S. 1024. Moreover, petitioner was not prejudiced by the lack of the transcript, for he was afforded what amounted to complete discovery of the government's case, including the various schedules and summaries of interview which the agent had prepared (Tr. 790-933).

7. In answer to petitioner's contention (Pet. 32-33) that the government's expert witness on cross-examination improperly commented on the credibility of the earlier testimony of the witness Pagnotta, we rely upon the following statement of the court of appeals (Pet. App. A 7-8):

> Allen also contends that the government's expert summary witness, Adele Kihlken, improperly commented upon the credibility of Mr. Pagnotta's testimony. The statement complained of was made in answer to a question by defense counsel as to why Mr. Pagnotta's testimony was not reflected in the accounts receivable figures. The witness explained that she had to accept one figure or another for her summary. She further explained that she understood Mr. Pagnotta's testimony to be that he made payments to Allen during the period in question, but yet the amount of his debt to Allen remained the same. Trial counsel brought out in further cross-examination that Mrs. Kihlken's understanding of Mr. Pagnotta's testimony may have been wrong. It is important to

> note, however, that on redirect examination Mrs. Kihlken testified concerning the effect including the payments testified to by Mr. Pagnotta would have on the net worth summary. All of the facts were before the jury for the jury's resolution. We find no error in this contention.

8. Finally, petitioner argues (Pet. 33-40) that he was denied the effective assistance of counsel. However, this contention rests upon lengthy factual assertions (Pet. 33-36) which find no support in the record. As we have pointed out, petitioner's chief trial counsel, Robert J. Rotatori, had had considerable experience in criminal trial practice. He had participated in the case for ten months prior to trial and was assisted by Mr. Kleinman, an attorney and certified public account, who had formerly worked for the Internal Revenue Service, and who was also familiar with the case. Indeed, Rotatori's examination of the revenue agent (Tr. 141-205) demonstrated that he had a thorough knowledge of petitioner's records, accounts and businesses.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[4]Petitioner also argues (Pet. 40-42) that he should have a new trial because his counsel Rotatori received a notice during the trial that his own tax returns were being audited. But that fact in no way demonstrates that the Internal Revenue Service was attempting to harass or intimidate him. The trial judge noted that when he was a practicing lawyer he had been audited many times. He stated that he would look into the matter (Tr. 1067-1070) and defense counsel said nothing further about it.

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